

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

HEATHER NELSON,

Plaintiff,

v.

Case No.: 11-cv-307

SANTANDER CONSUMER USA, INC.,
PATRICK K. WILLIS CO., INC.,
d/b/a AMERICAN RECOVERY SERVICE,
ASSETSBIZ CORP. d/b/a ABC RECOVERY,

Honorable Barbara B. Crabb

Defendants.

**DEFENDANTS' MOTION IN LIMINE NUMBER 5
TO EXCLUDE ANY STATEMENTS OR ARGUMENT THAT APPEAL TO JURORS'
PASSIONS OR THAT THEY MAKE DECISIONS BASED ON EMPATHY OR ANGER**

Defendant Santander Consumer USA, Inc., Patrick K. Willis Co., Inc., d/b/a American Recovery Service, and AssetsBiz Corp. d/b/a ABC Recovery ("Defendants"), by their attorneys, respectfully requests this Court enter an order *in limine* to exclude at trial any and all statements or arguments by plaintiff Nelson or her counsel that improperly appeal to the juror's passions or suggest the jurors make a decision based on empathy, pity or anger, rather than the evidence and the law. Such statements and arguments are irrelevant and highly prejudicial and are barred by Federal Rules of Evidence 401 and 403.

Examples of these prohibited statements include a "golden rule" argument that urges jurors to place themselves or their loved ones in Plaintiff's position or other inappropriate commentary that falsely implies that Plaintiff brought this lawsuit to enhance employee safety or that the jury can and should "send a message" with its verdict. Plaintiff Nelson brought this suit to collect monetary damages. She has not requested injunctive relief and a verdict in her favor will not result in any such relief.

“The jury's function is to weigh the evidence and determine whether [the plaintiff] has sustained its burden of proof. It is improper to inflame the passions or prejudice of the jury by implying that the jury has a different role.” *United States v. Maas*, No. 97-2118, 1997 WL 785526, at *4 (10th Cir. Dec. 22, 1997). *See also Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1246 (7th Cir. 1982) (holding that “Golden Rule” appeal in which the jury is asked to put itself in the plaintiff's position “‘is universally recognized as improper’”) (citation omitted), *aff'd*, 465 U.S. 752, (1984) *Wielgus v. Ryobi Techs., Inc.*, No. 08 CV 1597, 2012 WL 1853090 (N.D. Ill. May 21, 2012) (comments that the jury “send a message” are improper). “While sympathy for suffering and indignation at wrong are worthy sentiments, they are not deemed proper elements of counsel’s argument to the jury.” 75A Am. Jur. 2d Trial § 546 (2012). Statements that therefore encourage jurors disregard the law to remedy purported injustice are highly inappropriate and, if egregious enough, can warrant a mistrial or reversal. *United States v. Maass*, 1997 WL 785526, at *4-5. The extreme prejudice resulting from the these types of arguments and the fact that they are not easily correctable with a limiting or curative instruction warrants an order prohibiting them at the outset of trial before they are made and the damage is done.

WHEREFORE, defendant Santander Consumer USA, Inc., Patrick K. Willis Co., Inc., d/b/a/ American Recovery Service and AssetsBiz Corp., d/b/a/ ABC Recovery respectfully request that this Court enter an order precluding plaintiff Heather Nelson and her counsel, from making any statements or arguments that improperly appeal to the juror’s passions or suggest the jurors make a decision based on empathy, pity or anger, rather than the evidence and the law.

Dated: May 10, 2013

SANTANDER CONSUMER USA, INC.,
PATRICK K. WILLIS CO., INC., d/b/a
AMERICAN RECOVERY SERVICE
AND ASSETSBIZ CORP., d/b/a/ ABC
RECOVERY

Defendants

s/ David Z. Smith

David. Z. Smith

Gary S. Caplan

Robert O'Meara

Reed Smith LLP

10 South Wacker Drive

Chicago, IL 60606

312.207.1000

dzsmith@reedsmith.com

CERTIFICATE OF SERVICE

I, David Z. Smith, hereby state that on May 10, 2013, I electronically filed the foregoing **DEFENDANTS' MOTION IN LIMINE NUMBER 5** with the Clerk of the U.S. District Court for the Western District of Wisconsin using the ECF system, which will send notification to all parties of record.

By: /s/ David Z. Smith
David Z. Smith (IL ARDC No. 6256687)
REED SMITH LLP
10 South Wacker Drive
Chicago, Illinois 60606
(312) 207-1000